



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5**



In the Matter of:)	
)	
National Healthcare Mfg. Corp.)	Docket No. FIFRA-5-99-011
(f/k/a Gam-Med Packaging Corp.))	
)	
Respondent.)	
_____)	

INITIAL DECISION AND DEFAULT ORDER

This initial decision is upon Motion for Issuance of an Order of Default, filed by the Complainant, Chief, Pesticides and Toxics Branch, United States Environmental Protection Agency (U.S. EPA). The motion seeks an order assessing a civil penalty in the amount of Five Thousand Five Hundred Dollars (\$5,500) against the Respondent, National Healthcare Manufacturing Corporation (National Healthcare). Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (revised Consolidated Rules) at 64 Fed. Reg. 40138 (July 23, 1999) (to be codified at 40 C.F.R. Part 22)¹, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law and Penalty Calculation, Complainant's Motion for Issuance of an Order of Default is hereby GRANTED.

Background

This civil administrative action was instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136 l(a), and the

¹All further references are to the revised Consolidated Rules.

Consolidated Rules. On July 20, 1999², a Complaint was filed against the Respondent alleging violation of FIFRA, due to the Respondent's failure to file an Annual Establishment Report for 1997. A civil penalty of Five Thousand Five Hundred Dollars (\$5,500) was proposed in the Complaint.

The Complaint issued to the Respondent states on page 5, in the section headed "Opportunity to Request a Hearing" that, "If you wish to avoid being found in default, you must file a written Answer to this Complaint and Notice of Opportunity for Hearing with the Regional Hearing Clerk within twenty (20) days of service of this Complaint." The Complaint also states that "If you fail to file a written Answer, with or without a Request for Hearing, within twenty (20) days of your receipt of this Complaint, the Acting Regional Administrator or Presiding Officer may issue a Default Order. Issuance of a Default Order will constitute a binding admission of all facts alleged in the Complaint and a waiver of your right to a hearing under FIFRA. The civil penalty proposed in this Complaint shall then become due and payable without further proceedings sixty (60) days after a Final Order of Default is issued, as per 22 C.F.R. 22.17(a)."

The Complaint was sent by certified mail and signed for by the Respondent on July 21, 1999. U.S. EPA has produced the certified mail return receipt card evidencing proper service. To date, the Respondent has failed to file an Answer to the Complaint.

On November 12, 1999, the Complainant filed a Motion for Issuance of an Order of Default. It was served on the Respondent by First Class Mail. To date, the Respondent has

²Revisions to 40 C.F.R. Part 22 became effective on August 23, 1999 for proceedings commenced prior to that date, unless to do so would cause substantial injustice. 64 Fed. Reg. 40138 (July 23, 1999).

failed to file a Response to the Motion for Issuance of an Order of Default.

Findings of Violation

The following allegations in the Complaint are deemed admitted:

1. On July 20, 1999, U.S. EPA filed an administrative complaint against the Respondent National Healthcare Manufacturing Corporation alleging a violation of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136 l(a), and the regulations promulgated thereunder.

2. The Respondent is a registered pesticide producing establishment.

3. The Respondent has a U.S. EPA Establishment Number.

4. The Respondent possessed its Establishment Number during calendar year 1997.

5. Per Section 7(c)(1) of FIFRA, 7 U.S.C. 136 e(c)(1), and the regulations codified at 40 C.F.R. 167 Subpart E, the Respondent was required to submit an Annual Establishment Report for 1997.

6. The Respondent did not submit its Annual Establishment Report for 1997.

7. By failing to submit its Establishment Report for 1997, the Respondent is in violation of the FIFRA and the regulations promulgated thereunder.

8. The Complaint sought a penalty of \$5,500 for the violation committed by the Respondent.

The record also supports the following findings:

9. The Complaint was served by certified mail; the return receipt card was signed.

10. The Respondent has failed to file an Answer to the Complaint.

11. The Respondent was served with a Motion for Issuance of an Order of Default.

12. The Respondent has failed to respond to the Motion for Issuance of an Order of Default .

Conclusions of Law

1. Jurisdiction for this action was conferred upon U.S. EPA by Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136l(a).

2. The Respondent was properly served the Complaint.

3. The Respondent has not filed an Answer to the Complaint.

5. The Respondent's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. 22.17(a) and 22.15(d).

6. By failing to file its Establishment Report for 1997, the Respondent is in violation of the FIFRA and the regulations promulgated thereunder. 40 C.F.R. 167 Subpart E.

7. Section 14(a) of FIFRA, 7 U.S.C. 136l(a) authorizes a civil penalty of up to \$5,000 for a violation of FIFRA. The amount has been increased to \$5,500 by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461, as amended, and the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701.

8. The Respondent's failure to file a timely answer to the Complaint or otherwise respond to the Complaint, is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violation described above.

Penalty Calculation

Under Section 14(a)(4) of FIFRA, the statutory penalty factors include " the appropriateness of such penalty to the size of business of the person charged, the effect on the

person's ability to continue in business, and the gravity of the violations.” The U.S. EPA guidance document used to implement these statutory penalty factors in a consistent nationwide manner is the “*Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*,” dated July 2, 1990 (ERP). It sets out five steps to be performed by U.S. EPA personnel when proposing penalties in FIFRA administrative actions. In compliance with the policy, U.S. EPA determined the gravity of the violation and size of the business (Steps 1 and 2). U.S. EPA then used Table 1 of the ERP to determine a proposed penalty of \$5,000 (Step3) (Increased by application of the Federal Civil Penalties Inflation Adjustment Act of 1990). Step 4 requires consideration of gravity adjustments; U.S. EPA determined that no adjustments were appropriate. Step 5 requires “consideration of the effect that payment of the total civil penalty will have on the violator’s ability to continue in business.” As U.S. EPA had no evidence or information that the proposed penalty would adversely affect the Respondent’s ability to continue in business, no adjustment was given.

I have determined that the penalty amount proposed is appropriate based upon Section 14(a)(4) of FIFRA and the ERP. The record supports the proposed penalty.

Default Order

Respondent is hereby ORDERED as follows:

A. Respondent is assessed a civil penalty in the amount of Five Thousand Five Hundred Dollars (\$5,500).

B. Payment shall be made by certified or cashier’s check payable to “Treasurer of the United States of America” within thirty (30) days after the effective date of the final order. 40 C.F.R. 22.31(c). Such payment shall be remitted directly to:

U.S. Environmental Protection Agency
Region 5
P.O. box 70753
Chicago, Illinois 60673

C. A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-19J) and Counsel for the Complainant (Mail Code C-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

D. This Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the Environmental Appeals Board (401 M Street, S.W., Washington D.C. , 20460) or the Environmental Appeals Board elects, sua sponte to review this Initial Decision and Default Order. 40. C.F.R. 22.27c. A party may appeal an initial decision within thirty (30) days after service on the parties. 40 C.F.R. 22.30(a)(1).

IT IS SO ORDERED.

Dated: January 25, 2000

/S/

Francis X. Lyons
Regional Administrator

Prepared by Regina Kossek, Regional Judicial Officer